No. 14-114

In the Supreme Court of the United States

DAVID KING, *et al.*,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE STATES OF OKLAHOMA, ALABAMA, GEORGIA, NEBRASKA, SOUTH CAROLINA, AND WEST VIRGINIA, AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici States Oklahoma[1], Alabama, Georgia, Nebraska, South Carolina, and West Virginia have a direct stake in the outcome of this case. Sections 1311 (*codified at* 42 U.S.C. § 18031) and 1321 (*codified at* 42 U.S.C. § 18041) of the "Patient Protection and Affordable Care Act," Pub. L. No. 111-148, 124 Stat. 119, as amended by the "Health Care and Education Reconciliation Act of 2010," Pub. L. No. 111-152, 124 Stat. 1029 (collectively, the "Act" or "ACA"), allow States to choose to establish an "American Health Benefit Exchange" (an "Exchange") to facilitate execution of the Act's key provisions. If a State elects not to establish an Exchange under Section 1311, Section 1321 authorizes the Secretary of Health and Human Services instead to establish a federal Exchange to operate in that State.

If a State elects to establish its own Exchange, the federal government will make "advance payments" of premium tax credits to insurance companies on behalf of some of the State's residents to subsidize health insurance enrollment through the state-created Exchange. Under the plain language of Section 36B of the ACA, however, such tax subsidies are *not* available to individuals who live in States that have chosen not to establish an Exchange. Significantly, the federal

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[1] Oklahoma has filed with this Court a Petition for Writ of Certiorari, asking this Court to review a decision of the United States District Court for the Eastern District of Oklahoma concerning the validity of the IRS Rule from a State's perspective, alongside this case. *See* Pet. for a Writ of Cert., *Oklahoma, ex rel. E. Scott Pruitt v. Burwell et al.*, No. 14-586 (November 18, 2014).

government's payment of a subsidy—for even a single employee—triggers costly obligations for employers within that State (including the States themselves) as a result of application of the so-called "large employer mandate," placing such States at a competitive disadvantage in employment.

Amici States have predicated decisions regarding establishment of Exchanges on the implementation of the ACA and its incentives as Congress wrote them, only to have those expectations unsettled by an interpretation of that law that cannot be squared with the plain text of the statute.

SUMMARY OF THE ARGUMENT

I. There is nothing absurd or even unusual about the plain text of Section 36B of the ACA. Congress drafted the ACA like it does most other cooperative federalism legislation—with a variety of incentives offered to States willing to assume the burden of implementing the federal program. Indeed, Congress routinely enacts legislation that withholds, or limits the availability of, federal benefits to citizens of those States that choose not to implement federal policy and sacrifices the uniform implementation of important national goals in an effort to secure States' implementation of a law.

With regard to the ACA, the incentives were necessary because the ACA provides that "[e]ach State shall establish an American Health Benefit Exchange . . . for the State." ACA § 1311(b)(1), 42 U.S.C. § 18031(b)(1). But in recognition of the core principle of federalism that the federal government cannot command States to act on its behalf, *see Printz*

v. United States, 521 U.S. 898, 935 (1997), the Act acknowledges that a State may decline to establish an Exchange.

Because Congress desired (and needed) state cooperation with implementation of the ACA, it had no choice but to entice the States to implement the Act, and Section 36B's conditioning of tax credits was the primary means of doing so. Therefore, the IRS's insistence that the overriding policy goals of the Act require that Section 36B be rewritten by agency rule is completely at odds with Congress's equally-important policy goal of ensuring state cooperation in administering the Act.

II. Congress's conditioning of the tax credits came as no surprise to the States. First, and as explained above, such incentivizing is the norm in cooperative federalism programs. Second, the plain text of Section 36B plainly described the incentive, and other sections of the Act plainly describe the consequences of declining to accept the incentive. And third, even if any States failed to read and understand Section 36B, well-publicized litigation had been initiated prior to the date on which the States had to make their Exchange decision, so the States were on notice that the IRS Rule was of questionable legality.

The bottom line is that there is no merit to the argument that the IRS Rule must be upheld in order to prevent unfair surprise to the States. States are constantly aware of their options under federal programs and how participation, or non-participation, in federal programs will affect their residents. Here, *Amici* States and others relied on the plain language of Section 36B to evaluate their options and based their

decision to set up a state Exchange on several factors, one of which was the availability of Section 36B's tax subsidies and the resulting effect on the applicability of the large employer mandate. Concluding that the States were somehow unaware of the effects their decisions would have is not only contrary to the facts but would also improperly impose unprecedented burdens on States that relied on the plain meaning of the ACA's language in electing not to participate in the federal program.

III. In promulgating its rule, the IRS ignored the longstanding presumption—legislatively established by Congress in the McCarran-Ferguson Act of 1945, Pub. L. No. 79-15, 59 Stat. 33 (codified at 15 U.S.C. § 1011)—that health insurance regulation is a matter of traditional state control. Because that is so, to regulate in this area Congress must specifically and unambiguously state its intent to do so. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-461 (1991). Absent such a "clear statement," a Court must adopt a reading of the challenged statute that leads to the least amount of federal incursion. The IRS's Rule results in the ACA's large employer mandate overriding state insurance laws in over three dozen states. Thus, upholding the IRS's interpretation of Section 36B will result in harm to the States by altering the balance of power between the federal government and the States without the requisite clear statement from Congress that it intended that result.

IV. The IRS's bizarre insistence that HHS has "stepped into the shoes" of those States that declined to establish an Exchange and has instead established "an Exchange established by the State" on those States'

"behalf," raises the very sort of political accountability concerns that this Court has repeatedly warned against and leads to confusion in the populace as to which sovereign should be held responsible for problems arising out of this newly-federalized regulatory regime. Because of that confusion, the IRS's interpretation of Section 36B is inherently unreasonable.

ARGUMENT

I. Congress's conditioning the availability of the ACA's tax credits is consistent with Congress's long-running practice of conditioning federal dollars on State implementation of federal programs.

One of the overarching purposes of the ACA is to increase participation in the health insurance market—no one disputes that. Congress correctly recognized, however, that the key to accomplishing that goal was getting State cooperation in implementing the Act. Thus, Congress built an equally-important purpose into the structure of the ACA: to have the States lead implementation and management of the new healthcare system.[2]

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[2] As the Secretary of Health and Human Services herself recognized, "[i]t all starts with the assumption that states take the lead." Kate Pickert, *Health Reform: Reluctant States Could Invite a Federal Takeover*, Time, Nov. 12, 2010 (*available at* http://content.time.com/time/nation/article/0,8599,2030932,00.html). *See also* 156 CONG. REC. S1821-06 (statement of Sen. Conrad) ("This health care reform . . . creates State-based health exchanges for individuals and small businesses."); *id.* (statement of Sen. Murkowski) ("[T]he health care bill that is now law creates these State exchanges where all non-Medicaid and Medicare individuals will go to purchase their health insurance."); 165 CONG. REC.

In so doing, Congress was simply doing what it often does when attempting to engage in cooperative federalism. Indeed, an examination of other legislation reveals that the statutory mechanisms employed by the ACA to entice States to take the lead are commonplace. As with other social welfare programs, Congress intended the ACA to benefit lower income citizens across the nation—here, by reducing healthcare costs. But the ACA *also* clearly reflects Congress's separate objective that—in keeping with all major social welfare legislation enacted since the New Deal—States should have principal responsibility for implementing the ACA's provisions, including the establishment of Exchanges. Congress could not constitutionally "order States to regulate according to its instructions," *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2608 (2012), and it thus encouraged States to implement federal policy by offering tax subsidies only to those citizens of the States that had set up Exchanges. Other provisions of the ACA reflect similar efforts to influence States' policy choices. *See* 42 U.S.C. § 1396c (providing that payment of Medicaid funding to States may be conditioned on compliance with federal requirements).

S1923-08 (statement of Sen. Baucus) ("The bill also provides for State-based exchanges."); *id.* (statement of Sen. Feingold) ("[O]ver the next 4 years, States will prepare to set up health insurance exchanges for individuals and small businesses to purchase more affordable health insurance."); 156 CONG. REC. H2201-01 (statement of Rep. Burgess) ("Now, you have heard that several States around the country are looking at, I believe it's up to 37 . . . somehow exempting their State from participating in this new Federal legislation, and that also means that they may not set up the State-based exchange that the bill, the Senate bill, calls for.").

Offering tax credits only to States who have chosen to take on the burden of establishing Exchanges is simply the natural consequence of this familiar legislative approach. In this regard, the ACA is on all fours with a host of federal social welfare programs that are directed at providing assistance to citizens nationwide but that nevertheless condition the federal assistance actually available to citizens on whether, or the extent to which, their State has chosen to implement federal policy. Such laws reflect Congress's recognition of a self-evident proposition: the measures needed to incentivize State implementation of federal social welfare legislation may mean that policy will not be uniformly implemented across the United States and that citizens of different States may receive varying levels of federal assistance. Simply put, Congress does this all the time.

For example, the stated purpose of the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended primarily in scattered sections of 20 U.S.C.) ("NCLB"), is to "ensure that *all* children have a fair, equal, and significant opportunity to obtain a high-quality education." 20 U.S.C. § 6301 (emphasis added). To accomplish this purpose, Congress intended to "distribut[e] and target[] resources sufficiently to make a difference to . schools where needs are greatest." *Id.* § 6301(5). But the NCLB conditions this federal educational funding—and thus the benefits available to the children that live in a State—on the State's compliance with and implementation of federal policy. To receive funding under the NCLB, a State must submit a detailed plan to the Secretary of Education that provides for statewide academic standards, academic

assessments, and academic accountability, *id.* § 6311(a)-(b), and must submit detailed annual state "report cards," *id.* § 6311(h). States may also receive special funding under NCLB—for example, for teaching children with limited English proficiency—if they agree to monitor educational subunits for compliance with federal educational goals and to sanction those subunits for noncompliance (with sanctions including firing teachers, changing curricula, or withholding funds). *See, e.g.*, *id.* § 6842(a)(1), (b)(4)(A)-(B).

As a result of these and other federal funding mechanisms, the amount of federal educational funding distributed, on a per-pupil basis, differs substantially across different States and school districts depending on the extent to which the particular State has elected to implement the federal policies. For example, according to the Department of Education's 2010 statistics for the 100 largest public elementary and secondary school districts in the United States, Utah's Jordan School District received approximately $36.5 million in federal revenue (around $750 per pupil), whereas Georgia's Atlanta Public Schools received approximately $102.6 million (or $2100 per pupil). *See* Stephen Q. Cornman, Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., NCES 2013-307, Revenues and Expenditures for Public Elementary and Secondary School Districts: School Year 2009-10 (Fiscal Year 2010) 10 (2013) (*available at* http://nces.ed.gov/pubs2013/2013307.pdf).

The Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, 123 Stat. 8 ("CHIP"), is likewise directed at assisting children across the United States. CHIP's purpose is

"to provide dependable and stable funding for children's health insurance under . the Social Security Act in order to enroll *all* six million uninsured children who are eligible, but not enrolled, for coverage." Pub. L. No. 111-3, § 2, 123 Stat. 8, 10. Children are eligible for these benefits, however, only if they live in States that have chosen to submit "child health plans," 42 U.S.C. § 1397aa(b), which must comply with numerous federally determined requirements relating to eligibility and care metrics, *see id.* § 1397bb. States must receive federal approval of proposed plans as a condition of funding. *Id.* § 1397ff(a)(1). CHIP provides States with "performance bonus awards" to offset enrollment costs resulting from enrollment and retention efforts. *Id.* § 1397ee(a)(3).

Again, as a result of States' differing choices regarding their implementation of this program, federally funded services available to citizens may vary in numerous respects depending on their location. For example, in Colorado, higher-income enrollees in CHIP (at 150-200 percent of the federal poverty level) must make a $30 co-payment for an emergency care visit, whereas enrollees at that income level in Illinois pay only $5. *See* U.S. Government Accountability Office, GAO-14-40, Children's Health Insurance, Information on Coverage of Services, Costs to Consumers, and Access to Care in CHIP and Other Sources of Insurance 40, 43 (Nov 2013) (*available at* http://www.gao.gov/assets/660/659180.pdf). Habilitative outpatient services are not covered by CHIP plans in Utah or Kansas but are covered to varying extents in Colorado (40 visits), Illinois (no limits), and New York (six weeks of physical and occupational therapy, no limit on speech therapy). *Id.* at 13.

Similarly, Congress's child support enforcement program, *see generally* 42 U.S.C. §§ 651-669b, is designed to assist "*all* children" across the nation by securing financial support from noncustodial parents. *Id.* § 651. But again, depending on the States in which they reside, not all children necessarily benefit equally from this program. The amount of assistance afforded under the program depends on (among other things) an "incentive payment" made by the federal government to the State. To qualify for such payments, States must first establish a compliant plan for child and spousal support that meets extensive federal guidelines as to staffing, statewide applicability, paternity establishment services, and more. *Id.* § 654. Plans complying with detailed federal requirements may then qualify for federal assistance based on state performance levels in various categories (*e.g.*, paternity establishment, support orders, arrearage payments, and cost-effectiveness), *id.* § 658a(b)(4), and on whether that State has met data quality standards, *id.* § 658a(b)(5)(B).

States with higher performance levels receive greater incentive payments, and correspondingly enjoy greater funding for services to establish paternity, locate noncustodial parents, and enforce child support orders. Thus, as with the NCLB and CHIP, children residing in States that receive more federal funding may receive greater benefits than those living in States that receive less. For example, both Texas and Ohio received roughly similar amounts of federal incentive payments in fiscal year 2010 (approximately $33.8 and $32.2 million, respectively), *see* Carmen Solomon-Fears, Cong. Research Serv., RL 34203, Child Support Enforcement Program Incentive Payments:

Background and Policy Issues (2013) (*available at* https://www.fas.org/sgp/crs/misc/RL34203.pdf), even though the population of Texas is more than twice that of Ohio, *see* U.S. Census Bureau, Population Distribution and Change, 2010 Census Brief (2011) (*available at* http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf) (population of Texas is 25.1 million, while population of Ohio is 11.5 million).[3]

Each of these federal programs conditions availability of federal assistance on State implementation of federal policy. Each have a general purpose of helping a specific population of individuals. But that purpose of helping a general population does not override or detract from the equally-important policy and purpose of having the State implement these programs. Like these other legislative frameworks, the ACA reflects Congress's judgment that certain federal programs are best implemented at the State level and its recognition that, as a result of States' different choices, it is possible that not all U.S. citizens will receive equal benefits under such federal programs. As it has with numerous other social welfare programs,

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[3] Other federal statutes similarly condition the availability or amount of federal subsidies that a citizen may receive on their State's implementation of federal policy. *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (1996) (granting support for direct cash assistance to needy families contingent on a State's maintenance of certain funding levels and establishment of work requirements); Supplemental Nutrition Assistance Program, 7 U.S.C. § 2013 (authorizing issuance of allotment to eligible households in a State, provided States request such benefits and do not collect local sales tax on foods purchased with program benefits).

Congress conditioned the benefits that would be available to a State's citizens under the ACA on their State's decision to implement federal prerogatives. There is nothing absurd—nor even unusual—about that result.

To the contrary, the ACA exemplifies what has become the legislative norm since the Supreme Court made clear that the Constitution does not permit federal commandeering of State governments. Congress now drafts laws that contemplate that the States will be the default and preferred implementers of federal policy but provide for a federal "fallback" option, whereby the federal government will step in and operate a program should a State decline to do so or fail to implement it successfully.

To cite but a few examples of such laws, the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, contemplates that States will submit to the Environmental Protection Agency ("EPA") for approval plans that implement national air quality standards. *See id.* § 7410(a)(1). But the law provides that the EPA will step in and promulgate a federal implementation plan if the State does not submit a plan or the State's plan is not acceptable. *Id.* § 7410(c)(1).

Likewise, the Telecommunications Act of 1996 (codified throughout 47 U.S.C.) contemplates that State public utility commissions will review and approve interconnection agreements between an incumbent carrier and competing local exchange carriers, *see* 47 U.S.C. § 252(e)(1), but provides that the Federal Communications Commission will assume responsibility for resolving these matters should the State commission fail to act, *see id.* § 252(e)(5). The

Wholesome Meat Act, Pub. L. No. 90-201, 81 Stat. 584 (1967) (codified as amended at 21 U.S.C. §§ 601-695), provides that a State may receive federal funding and implement programs to protect the public from consuming unwholesome meat, *see id.* § 661(a), but authorizes the Secretary of the United States Agriculture Department to take action if the State's program is inadequate, *see id.* § 661(c)(1).

Similarly, the Occupational Safety and Health Act, Pub. L. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651-678 *et seq.*), authorizes States to assume responsibility for the development and enforcement of occupational safety and health standards, *see id.* § 667(b), and authorizes federal grants to assist States in implementing such plans, *see id.* § 672(a). However, the Secretary of the Department of Labor has responsibility for implementing federal policy if a State's plan fails to comply with the applicable requirements. *See id.* § 667(d)-(f).

While all of these statutes, like the ACA, contemplate that the federal government will step in and act directly should a State fail to implement federal law adequately, or simply choose not to act, none of them contemplates what the IRS did here– i.e., the imposition on non-participating States of burdens that under the statute they would have assumed only if they had chosen to participate in the federal legislative scheme. As with all of the legislative frameworks discussed above, the ACA affords States certain benefits if they choose to implement federal law. Some citizens receive federal tax credits, a State may receive federal grant money to establish an Exchange, and a State will have some flexibility to

decide how its Exchange will operate. But a State's implementation of an Exchange also entails burdens, as the availability of tax subsidies extends the individual mandate to many otherwise-exempt individuals and triggers costly tax obligations for the State's employers.

Statutes like the ACA are designed to give States a choice, in view of the benefits and burdens that come with implementation of federal policy, to participate in a federal program or to decide against doing so. *Cf. Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 596-97 (1983) (plurality opinion) ("[T]he receipt of federal funds under typical Spending Clause legislation is a consensual matter: the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt . . [S]tatutes must respect the privilege of the recipient of federal funds to withdraw and terminate its receipt of federal money rather than assume the further obligations and duties that a court has declared are necessary for compliance.").

In sum, the IRS's rule denies States the right to make the tradeoff expressly contemplated by the ACA, and it does so based on the faulty premise that Congress could not have intended such a tradeoff. As shown above, Congress regularly and routinely offers States such tradeoffs. Thus, there is no absurdity that results from reading Section 36B to mean what it plainly says.

II. In making their Exchange-establishing decisions, the States were well aware that the plain text of Section 36B conditioned the availability of tax credits on States establishing exchanges.

Congress's attempt at enticing States to set up state Exchanges had four components. First, Congress threatened to implement Exchanges directly in States that refused to participate. 42 U.S.C. § 18041(c). Second, Congress offered huge federal grants to States who agreed to set up Exchanges, 42 U.S.C. § 18031(a), and did not authorize any funding for HHS to create federal Exchanges. Third, Congress penalized States that declined to create their own Exchanges by prohibiting them from tightening their Medicaid eligibility standards. *See* 42 U.S.C. § 1396a(gg) (requiring maintenance of eligibility standards until "the Secretary determines that an Exchange established by the State under section [1311 of the ACA] is fully operational"). Fourth, and most importantly, Congress authorized tax credits to the residents of States who purchase health insurance through a state-established Exchange, while withholding those credits from residents of States who purchase health insurance through a federally-established Exchange. 26 U.S.C. § 36B.

As explained above, these sort of incentives are commonplace in cooperative federalism. As a result, the States are well-equipped for parsing through the various pros and cons of cooperating with federal prerogatives and they did just that in deciding whether to set up an Exchange. To be sure, the States were aware that the IRS was claiming that tax credits would

be available regardless of the States' decisions, but the States (1) could read the plain text of Section 36B and see that it conditioned the subsidies, and (2) were aware of the many arguments—including those made by the State of Oklahoma in litigation some two months prior to the exchange-establishing deadline imposed by HHS—that the IRS Rule was contrary to Congress's intent.

Simply put, there is no merit to the argument that the IRS Rule must be upheld in order to prevent unfair surprise to the States. States are constantly aware of their options under federal programs and how participation, or non-participation, in federal programs will affect their residents. To conclude otherwise would be not only contrary to the facts but would also improperly impose unprecedented burdens on States that relied on the plain meaning of the ACA's language in electing not to participate in this federal program.

III. If the IRS Rule is upheld, the States will be harmed by having an intrusion into a matter of traditional state concern absent a clear statement from Congress that it intended that intrusion.

Because the effect of the IRS's interpretation of Section 36B is to impose the large employer mandate in a majority of the States, despite those States having declined to establish an exchange, the IRS's interpretation of Section 36B violates the canon that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"

Gregory, 501 U.S. at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

Adherence to this clear statement canon is critical to avoid an upset of the "constitutional balance of federal and state powers." *Gregory*, 501 U.S. at 460. This canon protects the States' "substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 460-61.

Amici States and the federal government have long operated under the presumption—legislatively established by Congress in the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011—that health insurance regulation is a matter of state control. As this Court observed in the middle of the twentieth century, "[the control of all types of insurance companies and contracts has been primarily a state function since the States came into being." *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 316 (1958).

The State of Oklahoma, for example, has long comprehensively regulated the health insurance industry, as illustrated in Title 36 of the Oklahoma Statutes. *See, e.g.*, Life, Accident and Health Insurance Broker Act, OKLA. STAT. tit. 36, § 1462 (2011); Oklahoma Life and Health Insurance Guarantee Association Act, OKLA. STAT. tit. 36, § 2021 (2011); Life, Accident and Health Insurance Policy Language Simplification Act, OKLA. STAT. tit. 36, § 3642 (2011);

and Employer Health Insurance Purchasing Group Act, OKLA. STAT. tit. 36, § 4521 (2011). [4]

Oklahoma's extensive regulation of the health insurance industry is not unique. Most, if not all, states have similarly comprehensive health insurance schemes. The effect of the IRS's interpretation of Section 36B is to impose the large employer mandate in a majority of the States, upsetting those statutory schemes, without the requisite clear statement from Congress that such is what it intended. *See Gregory*, 501 U.S. at 460-461. And because there was no unmistakably clear statement by Congress giving the IRS the authority to expand the availability of tax credits to individuals who purchase insurance through a federal Exchange, this Court must interpret the statute in the least-federally-invasive way.

The IRS's rule does just the opposite and radically disrupts a longstanding state function by overriding the majority of the States' policy determinations as to what health insurance its large employers must offer. As a result, the IRS lacked the authority to promulgate the rule based on an alleged ambiguity in Section 36B.

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[4] This pervasive state regulation of insurance is also peppered throughout other titles as well. *See* OKLA. STAT. tit. 56, § 1009.2 (establishing a voucher program to provide coverage assistance to children eighteen years of age or younger whose parents are within eighty-five percent and three hundred percent of the federal poverty level); OKLA. STAT. tit. 11, § 23-108 (authorizing municipalities to provide health insurance for its employees); OKLA. STAT. tit. 70, § 5-117.5 (requiring boards of education in each school district to provide health insurance plans for the employees of that district).

Rather, only an "unmistakably clear" statement by Congress in Section 36B could confer that authority.

IV. The IRS's supposed "textual" justification for its rule raises serious political accountability concerns.

The IRS has attempted to justify its rule by arguing that for those States that declined to establish an Exchange, the federal government "stepped into the shoes" of those States and created for those States an "exchange established by the State."

Notwithstanding its logical flaws, this defense of the IRS's rule is inherently at odds with the concept of federalism itself, and raises political accountability problems of the sort this Court has so often decried. *See New York v. United States*, 505 U.S. 144, 167-69 (1992) (discussing political accountability and federalism); *Printz*, 521 U.S. at 919-921; *Nat'l Fed'n of Indep. Bus.*, 132 S.Ct. at 2602-03, 2660-61 ("[W]here the federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision") (quoting *New York*, 505 U.S. at 169.).

The dual-sovereignty nature of our government relies on the presumption that "freedom is enhanced by the creation of two governments, not one." *Bond v. United States*, 131 S.Ct. 2355, 2364 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). An integral concept in our system of dual sovereignty is that the "Federal Government may not compel the States to enact or administer a federal regulatory program."

Nat'l Fed'n of Indep. Bus., 132 S.Ct. at 2601 (quoting *New York*, 505 U.S. at 188.). This limitation is in place to ensure that the "status of the States as independent sovereigns in our federal system" is not undermined. *Id.* The belief that activities that touch on citizens' daily lives are administered by local officials as opposed to a "distant federal bureaucracy" also serves to make sure local officials aren't unfairly held accountable for the actions of that "distant federal bureaucracy." *Nat'l Fed'n of Indep. Bus.*, 132 S.Ct. at 2578 (citing The Federalist No. 45, at 293 (J. Madison)).

Here, the voters in Oklahoma and the other *Amici* States are overwhelmingly opposed to implementation of the ACA. By purporting to step into these States' shoes and establish "state" exchanges on their behalf, the federal government seeks to inject confusion into the populace as to who is to blame for implementation of the enormously unpopular ACA. For this reason also, the IRS's interpretation of Section 36B should be rejected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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